No. 85-1530

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM E. BROCK, SECRETARY OF LABOR, AND
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
APPELLANTS

v.

ROADWAY EXPRESS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE APPELLANTS

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We showed in our opening brief that the temporary reinstatement remedy created in Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), does not violate appellee's due process rights. Nothing in appellee's answering brief refutes our position.

1. Before discussing appellee's arguments, we wish to advise the Court of two developments since the filing of our opening brief. First, on August 21, 1986, the Secretary issued a final order adopting the administrative law judge's finding that appellee discharged employee Jerry Hufstetler in retaliation for Hufstetler's safety-related activities. The Secretary directed the reinstatement of Hufstetler to his former position, awarded Hufstetler back pay, and ordered the restoration of Hufstetler's other employment benefits.[1] Appellee has filed a petition for

[1] We have lodged ten copies of the Secretary's decision with the Clerk of this Court.

review of the Secretary's decision in the United States Court of Appeals for the Eleventh Circuit pursuant to 49 U.S.C. App. 2305(d)(1). See *Roadway Express, Inc.* v. *Brock*, No. 86-8771.

Appellee's obligation to reinstate Hufstetler now flows from the Secretary's final order, not from the temporary reinstatement order, but the district court's injunction against the enforcement of the temporary reinstatement order should not be vacated as moot. In *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), this Court recognized an exception to the mootness doctrine for controversies that are "capable of repetition, yet evading review." The Court has explained that, in the absence of a class action, this exception may be invoked when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); see also *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603 (1982); *First National Bank* v. *Bellotti*, 435 U.S. 765, 774-775 (1978); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).

Appellee is "one of the nation's largest over-the-road carriers" (J.A. 80); the Department of Labor informs us that the Secretary has issued findings in 28 Section 405 proceedings involving appellee.[2] There is thus a reasonable expectation that the controversy between appellee and the Secretary of Labor regarding the validity of a temporary reinstatement order will recur in connection with a future Section 405 complaint and that, as in the present case, the litigation will not be resolved prior to the issuance of the Secretary's final order. The present case accordingly is not moot.

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[2] Nineteen of these proceedings concerned a single employment practice.

A second development relating to this case is the issuance by the Secretary on November 21, 1986, of procedural regulations applicable to proceedings under Section 405 (see 51 Fed. Reg. 42091). These regulations, which are effective in 30 days and subject to revision upon the receipt of comments by interested persons, set forth the procedures governing the filing of a complaint, the Secretary's investigation, proceedings before the administrative law judge, and issuance of a final order by the Secretary. They essentially incorporate the relevant provisions of the statute and of the Secretary's published investigatory procedures relating to proceedings under Section 405.

2. On the merits, appellee and amici assert that the Court may avoid the constitutional issue in this case by construing Section 405 in a manner that provides appellee with the relief it seeks under the Due Process Clause. These proposed interpretations of Section 405 are plainly incompatible with both the plain statutory language and Congress's intent.

a. Appellee (Br. 13-15) and amici American Trucking Associations, Inc. (ATA) et al. (Br. 4-8) claim that this Court need not decide the constitutional issue presented in this case because Section 405 may be interpreted to require the Secretary to hold an evidentiary hearing before he issues a temporary reinstatement order. Nothing in the language of the statute or its legislative history indicates that Congress intended that result.

Section 405 spells out in considerable detail the procedural steps leading to the issuance of a temporary reinstatement order. The Secretary must notify the employer of the filing of the complaint, conduct an investigation, and inform both the complainant and the employer of his determination. If he finds "reasonable cause to believe that a violation [of Section 405] has occurred," the Secretary must issue a preliminary order

providing for the relief authorized under the statute. The employer may object to the preliminary order and request an on-the-record hearing, but the statute specifically provides that his objections "shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. App. 2305(c)(2)(A). The plain language of the statute thus requires reinstatement effective upon the issuance of the reasonable cause finding and prior to the evidentiary hearing.

The legislative history of Section 405 confirms this conclusion. Prior versions of what became Section 405 did not provide for temporary reinstatement of a discharged employee pending the completion of the evidentiary hearing. See, *e.g.*, Amendment No. 1440, § 409(c)(2)(A), to S. 3440, reprinted in 128 Cong. Rec. S14627 (daily ed. Dec. 14, 1982); S. 1390, 96th Cong., 1st Sess. § 109(c)(2)(A) (1979). The express provision for temporary reinstatement contained in the bill that was enacted into law makes clear that Congress intended that the employee would be reinstated as soon as the Secretary made his reasonable cause determination, so that the employee would be working while the evidentiary hearing was under way.[3] The only reason to interpret Section 405 in the manner suggested by appellee and these amici would be to avoid any possible constitutional infirmity, but since the Due Process Clause does not require a pre-reinstatement evidentiary hearing, there is no reason to consider that course here.

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[3] Amici ATA claim (Br. 6-7) that Congress did not understand that the statute provided for temporary reinstatement. This argument rests upon amici's speculation that Congress was unaware of the change in the language of the statute. That quite unlikely assumption – founded only upon the fact that the conference report refers to a "proposed order" and does not discuss the provision for temporary reinstatement – provides no grounds for ignoring the plain language of the statute.

b. Amicus Teamsters for a Democratic Union (TDU) offers its own imaginative statutory solution to the question presented in this case. It observes (Br. 18-22) that the Secretary's temporary reinstatement order may only be enforced through a proceeding in district court pursuant to Section 405(e), 49 U.S.C. App. (Supp. II) 2305(e), and asserts that this judicial proceeding provides the protections required by the Due Process Clause.

It is, of course, correct that a district court action under Section 405(e) is the vehicle for the enforcement of the Secretary's orders. But, as even appellee concedes (Br. 44-45), the district court action is not a forum for the relitigation of the Secretary's reasonable cause determination; Section 405(e) provides for a summary judicial proceeding. All the Secretary need do in order to obtain an injunction from the district court is establish that he issued an order and that the employer has not complied with the terms of that order. Section 405 states that where the employer does not timely request an administrative hearing "the preliminary order shall be deemed a final order which is not subject to judicial review" (49 U.S.C. App. 2305(c)(2)(A)); that provision would be meaningless if the employer could later dispute the merits of the Secretary's order in the Section 405(e) enforcement proceeding. See also 49 U.S.C. App. 2305(d); cf. *United States* v. *Howard Electric Co.*, No. 85-1144 (10th Cir. Aug. 4, 1986) (discussing summary nature of analogous enforcement proceeding under the Occupational Safety and Health Act).

The Section 405(e) proceeding retains its summary character when the Secretary seeks to enforce a preliminary order. Nothing in Section 405(e) indicates that the scope of the proceeding depends upon whether the Secretary seeks to enforce a final order or a preliminary

order.[4] Indeed, the scope of the proceeding must be the same in both situations because nothing in Section 405(e) authorizes the district court to review the correctness of the Secretary's findings. Substantive review of those findings by a district court would undercut Congress's decision to provide for judicial review in the courts of appeals. Cf. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468-469 (1984).[5]

3. Congress adopted the temporary reinstatement remedy at issue in this case because it concluded that when there is reasonable cause to believe that an employee was discharged in violation of Section 405, the employer rather than the employee should bear the interim financial burden pending a disposition on the merits. That conclusion, based on concern both for the employee and for highway safety, was eminently reasonable. Those concerns clearly outweigh the comparatively insignificant interest of the employer in such a case. In any event, under the standard announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), appellee was provided with all of the procedures required by the Constitution.

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[4] The provision that TDU cites (Br. 20-21) as analogous to Section 405(c) – 29 U.S.C. 160(j) – is considerably narrower than Section 405(c) because it only authorizes the district court to provide preliminary relief requested by the National Labor Relations Board and does not apply with respect to the enforcement of the Board's orders for permanent relief.

[5] TDU suggests (Br. 18) that the Secretary's preliminary reinstatement order might be subject to judicial review under the Administrative Procedure Act. But there is nothing novel about requiring a litigant to exhaust his administrative remedies before obtaining judicial review. See 5 U.S.C. 704 (the relevant substantive statute may classify preliminary agency action as nonfinal, and therefore not subject to judicial review). Even if judicial review were available, moreover, a proceeding in court would not provide appellee with the procedural protections that it seeks. Cf. *Goss* v. *Lopez*, 419 U.S. 565, 581-582 n.10 (1975). Interpreting the statute as authorizing judicial review therefore would not eliminate the need to address appellee's constitutional claims.

The weightiest interest involved in this case is the employee's right to be protected against even an interim burden from a retaliatory discharge. The employee's reason for wanting that protection is obvious, but Congress had an even stronger motive for providing it: protection of trucking company employees is important to highway safety. See Gov't Br. 30-36.[6] Congress concluded that placing the burden of a reasonably disputed discharge on the out-of-work employee would severely hamper its safety program. As one truck driver testified in congressional hearings on the subject of motor carrier safety, "[t]he promise of back pay years down the road just is not enough protection when your car has been repossessed, your mortgage foreclosed, and your marriage broken up in the meantime." *Commercial Motor Carrier Safety: Hearing Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 96th Cong., 2d Sess. 35 (1980) (statement of Mel Packer).

The contrary interest asserted by appellee is its right – founded in the collective bargaining agreement – to terminate an employee.[7] Appellee does not contest the showing

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[6] Amici ATA suggest (Br. 5-6 n.4) that it is somehow inappropriate to rely upon the legislative history in ascertaining the purposes of Section 405 because the temporary reinstatement remedy was not present in the earlier versions of the statute. Even though this particular provision was not added until later, however, the relevant congressional purposes plainly were spelled out in connection with the earlier versions of the legislation.

[7] Appellee attempts (Br. 20 & n.16) to bolster its interest by asserting that "innocent" employees might be laid off as a result of a temporary reinstatement. Of course any such layoff would be required only because the employer has hired, but refuses to keep on the job, a person to replace the employee who, the Secretary has found reasonable cause to believe, was wrongfully discharged (see Gov't Br. 27-28 n.13). In any event, the possible impact of the reinstatement upon another employee is not relevant in ascertaining the scope of *appellee's* property interest.

in our opening brief (at 26-30) that this interest, quite apart from its being more than offset by the converse interest of the employee, deserves considerably less weight than the property interests at stake in this Court's other predeprivation due process cases. Appellee's interest is plainly not, for example, as significant as an employee's interest in continued employment or a welfare recipient's interest in continued benefits.[8]

The Secretary's procedures afford employers the fundamental requisites of due process—notice of the charges and an opportunity to respond (see Gov't Br. 19-26). This Court has found similar procedural protections sufficient

[8] Appellee argues (Br. 16-19) that the length of time between the temporary reinstatement of an employee and the final decision is relevant in assessing the weight of its property interest. As we discuss in our opening brief (at 30 n.14), the duration issue is a red herring here because the passage of time enlarges the employee's interest as well as the employer's and because—even as of this date—appellee has not reinstated the discharged employee. This Court's decision in *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), makes clear that as long as the government procedures provide a prompt post-deprivation remedy, a temporary deprivation of property may last for a reasonable period of time (slip op. 13). Section 405 expressly requires an "expeditiously conducted" hearing (49 U.S.C. App. 2305(c)(2)(A)) and therefore satisfies this threshold requirement. See also 51 Fed. Reg. 42094 (1986)—(provisions of new regulations imposing time limits for conclusion of hearing and issuance of decision by administrative law judge).

Appellee argues (Br. 18-19) that the post-reinstatement hearing will not be expeditious, citing "[t]he nature of the factual questions at issue" and the fact that the Secretary's final decision may not be issued until 120 days after the ALJ issues his preliminary decision. But the Court in *Loudermill* rejected a challenge to a six-month delay between the temporary deprivation of property and the conclusion of the post-deprivation hearing (slip op. 13 & nn.11, 12). And appellee's reference to the nature of the issues merely undercuts its contention (Br. 34-41) that a pre-reinstatement hearing could be completed so quickly that it would not delay the temporary reinstatement of a discharged employee.

to satisfy due process in situations in which the balance of the government and private interests was far more favorable to the party being deprived of a property interest. *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 8-9, 12; Gov't Br. 19-25.

Appellee's challenges to the adequacy of these procedural protections are discussed in detail in our opening brief (at 19-26, 38-47); we address only two points here. First, appellee asserts (Br. 34-41) that the additional procedural requirements for which it contends need not delay the temporary reinstatement of a discharged employee and, therefore, would not thwart the interests of the employee and the government in timely reinstatement. Appellee suggests that the Secretary could perform a speedier investigation and use the time saved on the investigation to conduct a pre-reinstatement hearing.

But there is no reason to believe that the Secretary has devised a needlessly complex procedure for conducting Section 405 investigations. The Secretary has balanced the need for a full, accurate investigation—mindful of the consequences for employers of the issuance of a reasonable cause finding—against Congress's desire for expeditious reinstatement of improperly discharged employees, and devised a system that in his view properly accommodates those values. The Secretary has taken the logical approach of conducting a careful investigation so as to ensure that his reasonable cause finding rests on solid ground.[9]

[9] Appellee intimates that the average length of the Secretary's investigation undercuts our assertion that there is a significant interest in expeditious reinstatement of wrongfully discharged employees. But appellee's statistics regarding the time period between the filing of the complaint and the issuance of a preliminary order are somewhat incomplete. The Department of Labor informs us that data for the first 10 months of this year indicate that the average investigation lasted 102 days (see App., *infra*, 1a-2a). Thus, as the Secretary has gained experience in administering Section 405, the average length of an in-

The more cursory investigations proposed by appellee would inevitably lessen the accuracy of the investigatory process. Moreover, the procedure proposed by appellee would make it easier for employers to prevail at the hearing stage. The employer's position would be fully represented at the hearing by the employer's own representatives; the employee, who is more likely to depend upon the Labor Department investigator to present his side of the story, might well be harmed by a less complete investigation.[10] Thus, the plan put forward by appellee is likely to lead to more favorable outcomes for employers at the expense of the statutory goal of obtaining the reinstatement of illegally discharged employees. If, on the other hand, the Secretary retains the present procedures for investigations, the pre-reinstatement hearing would lengthen the time between the filing of a complaint and the temporary reinstatement of the employee.[11]

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vestigation has steadily decreased from an average of six to seven months in 1983, to approximately four and one-half months in 1984 and 1985, to a little more than three months in the current year.

[10] Appellee characterizes the procedure it proposes as something less than a full evidentiary hearing (see Br. 34), but—like the procedure imposed by the district court (see J.S. App. 8a-9a)—the procedure advocated by appellee contains all of the elements of an evidentiary hearing identified by this Court in *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271 (1970). Moreover, the hearing proposed by appellee promises to be a time-consuming process. Not only would the investigator have to prepare witnesses to testify, but the employer would have a greater opportunity to obstruct the proceedings by, for example, prolonged cross-examination or efforts to introduce extraneous witnesses.

[11] Appellee cites (Br. 35-36) a variety of other statutes administered by the Secretary in support of its proposal for a pre-reinstatement evidentiary hearing and argues that these statutes support its approach. But, as appellee itself explains (*id.* at 36 n.26), these statutes are not relevant here because none of them provides for a temporary reinstatement remedy; they authorize only permanent relief. It therefore is not surprising that these statutes all require an evidentiary hearing prior to reinstatement. Congress's judgment that a preliminary remedy was required here plainly mandates a different procedural approach.

Second, appellee contends (Br. 27-31) that the Secretary's procedures are defective because the decision whether to issue a temporary reinstatement order is not made by an impartial decisionmaker. But appellee's entire argument rests upon the wholly erroneous assumption that the Labor Department investigator is the decisionmaker. In fact, the Secretary has delegated the authority to make these determinations to the regional administrators of the Occupational Safety and Health Administration (see 48 Fed. Reg. 35736 (1983)); appellee does not—and cannot—assert that these officials are in any way biased against employers.[12]

For the foregoing reason, and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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NOVEMBER 1986

[12] Appellee also claims (Br. 23-27) that the Due Process Clause requires the government to conduct a predeprivation evidentiary hearing in virtually every situation in which the relevant factual issue may turn upon subjective factors such as a credibility determination. As we show in our opening brief (at 23 n.12, 41-45), that claim is simply incorrect; this Court generally has not required an evidentiary hearing in such circumstances. Here, where appellee's property interest is relatively insignificant and the employer can effectively convey its side of the story through other procedures, such as presentation of its own witnesses and arguments by its attorneys or other representatives, the Constitution does not require a pre-deprivation evidentiary hearing.

SECTION 405 INVESTIGATIONS CONDUCTED IN 1986

Case Number	Date Complaint Filed	Date Findings Issued	Number Of Days	Results*
6-3280-86-502	3/19/86	4/24/86	36	N
7-3620-86-506	4/14/86	7/17/86	93	N
7-3620-86-503	2/21/86	5/19/86	87	N
4-2950-86-503	1/23/86	7/17/86	175	N
6-2320-86-503	4/23/86	7/11/86	79	N
4-0520-86-501	11/3/85	2/11/86	99	N
2-6010-85-503	2/6/86	3/21/86	43	M
6-1730-86-502	4/18/86	7/8/86	81	WD
4-0350-86-506	5/16/86	7/11/86	56	N
5-6850-86-504	12/9/85	4/16/86	128	N
8-0600-86-504	1/3/86	6/20/86	168	S
4-0280-86-503	10/28/85	1/29/86	93	M
9-3290-86-501	10/7/85	2/14/86	130	N
4-1220-86-506	4/25/86	8/1/86	97	N
7-2260-86-504	3/20/86	6/24/86	96	N
6-0150-86-505	6/19/86	9/18/86	91	N
4-2950-86-505	3/24/86	4/30/86	37	N
6-4140-86-504	3/18/86	5/14/86	44	N
5-2210-86-506	1/24/86	6/16/86	143	N
6-3550-86-501	3/7/86	4/23/86	47	N
3-3500-85-502	12/11/85	4/28/86	138	N
5-4760-86-501	1/27/86	5/12/86	105	NA
7-3620-86-501	11/26/85	3/11/86	105	N
3-0050-86-502	10/21/85	4/9/86	169	N
6-1730-86-501	11/15/85	1/29/86	75	N
3-0050-86-507	2/3/86	6/11/86	128	N
4-1760-86-504	2/5/86	3/4/86	27	S
4-0280-86-506	2/26/86	7/14/86	138	N
6-4140-86-505	4/1/86	8/13/86	135	M
8-1700-86-501	4/10/86	7/14/86	125	S
2-0050-86-501	12/2/85	6/20/86	200	M

Case Number	Date Complaint Filed	Date Findings Issued	Number Of Days	Results*
5-0460-85-503	9/3/85	3/15/86	193	N
6-3280-86-503	7/21/86	8/11/86	21	N
8-0060-86-503	12/9/85	4/25/86	137	N
7-2260-86-503	2/19/86	4/30/86	70	WD
7-3620-86-505	3/13/86	5/1/86	49	WD
4-0280-86-505	2/12/86	4/10/86	56	S
4-0290-86-505	2/3/86	8/1/86	179	N

*KEY:
N = Complaint found to be without merit
M = Complaint found to have merit
S = Case settled
WD = Complaint withdrawn by complainant
N/A = Not available.

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